

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TED E. BRICKEY**

Claimant

VS.

**COUNTY OF SHAWNEE**

Self-Insured Respondent

Docket No. **1,057,437**

**ORDER**

Claimant requests review of the October 21, 2011 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

Claimant alleged he suffered a hernia while shoveling snow. The Administrative Law Judge (ALJ) concluded claimant's recorded statement to the claims adjustor did not corroborate his assertion that the hernia was suffered while shoveling. Consequently, the ALJ determined claimant failed to meet his burden of proof that his hernia arose out of and in the course of his employment.

Claimant requests review of whether he suffered accidental injury arising out of and in the course of his employment. Claimant argues that he felt a tear while shoveling and shoveling was a work activity. Claimant further argues that Dr. Hu opined that because claimant experienced the tear while shoveling that is when he developed the hernia. Consequently, claimant requests that the ALJ's Order should be reversed.

Respondent argues that claimant's accidental injury did not arise out of and in the course of his employment and therefore the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the preliminary hearing on October 20, 2011, the parties agreed to an evidentiary record consisting of Dr. Hu's report of September 2, 2011, a letter dated September 1, 2011, addressed to Dr. Hu from claimant's counsel and a recorded statement given by claimant to the claims adjustor. No further testimony regarding the incident was provided.

Claimant is a corrections specialist with the Shawnee County Department of Corrections. His job is to supervise male adult inmates while they work on outside projects. The projects include mowing, weeding, picking up trash, and shoveling snow off sidewalks and driveways for qualified individuals such as the elderly, handicapped, disabled or low income individuals. Claimant performs the work side by side with the inmates.

On January 11, 2011, the crew had been hand shoveling snow. When claimant was back in the shop he stood and stretched with his arms overhead whereupon he heard a pop and felt a pain to the left of his belly button and down a couple of inches in his abdomen. In a recorded statement given to Luanne Henderson, an insurance claims adjuster, the insurance adjuster noted that the injury report she was provided indicated claimant stretched his arms overhead and felt a sharp pain in the abdomen. And the claimant agreed. But during further questioning the claimant explained the sequence of events:

**LUANNE:** And then the medical that I've got it said that you had been shoveling in January so explain that to me did you actually have an event then or you just know that you shovel or were did you have a pop at that time either?

**TED:** No no ma'am we we were shoveling at that time uh I think in fact we shoveled that day um but I didn't feel anything um when we were shoveling I felt it when we got back or before we left or whatever um when I stretched when I stretched in the shop that's the first time that I felt the sensation in my abdomen.

**LUANNE:** Okay so when you were shoveling was it there a[sic] at the premises at the jail or were you out in the city?

**TED:** Yeah I think we were doing um city work yep.

**LUANNE:** Okay so when you did that when you were shoveling you didn't have any problems you didn't have any pain whatsoever when you got back later and you what you guys were in the shop and then you were standing and stretching and then you felt the pop?

**TED:** Yes.

**LUANNE:** Okay no pop when shoveling.

**TED:** Yep kind of like a tear I don't know if you ever torn any muscles but

**LUANNE:** I been lucky so far don't jinx me please.

**TED:** Yeah I tore up the muscles in high school and college running track and playing football.

**LUANNE:** And you kind of know what it feels like then.

TED: Right I do.

LUANNE: Okay so no pain after the shoveling but when you were stretching then you had a pop.

TED: Yes.<sup>1</sup>

Claimant's attorney sent a letter requesting a causation opinion from Dr. Sidney Hu. The doctor replied:

I have been following Mr. Brickey in regards to a left inguinal hernia since July 29, 2011. At that time he had indicated to me that he felt a discomfort and tingling in his left groin after he had been shoveling snow that day at work. I understand that there is some dispute whether this occurred secondary to the shoveling versus when he stood and stretched afterwards and felt the pop. *Apparently from his testimony, he felt a tear at the time that he was doing the shoveling and, from his clinical history, I would have to assume that that is when the hernia occurred.*<sup>2</sup> (Emphasis Added)

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>3</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>4</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>5</sup>

The ALJ noted that claimant told the claims adjustor that he felt a pop in his abdomen while stretching back at the shop but that he didn't feel anything while shoveling. The ALJ then concluded his analysis of the evidence in the following pertinent part:

Dr. Hu's assumption, though logical, is not corroborated by the claimant's statement. There is no clear indication in the exhibit introduced that he was alleging his hernia arose out of his shoveling duties. The Court finds claimant has failed to prove that his need for hernia surgery arose out of his employment.

This Board Member disagrees. The evidence in this claim was provided by claimant's recorded answers to the questions asked by the insurance claims adjuster. At

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<sup>1</sup> P.H. Trans., Resp. Ex. A at 4-5.

<sup>2</sup> *Id.*, Cl. Ex. 1.

<sup>3</sup> K.S.A. 2010 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>4</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>5</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

the outset the claims adjustor's inquiry was focused on the incident when claimant felt a pop and pain in his abdomen while stretching in the shop. But on further questioning from the claims adjustor, the claimant noted that although he did not experience a pop while shoveling, nonetheless, he experienced a tear sensation similar to muscle tears he had experienced playing sports. And he agreed that he did not experience pain at that time. Dr. Hu relied upon claimant's recorded statement that he felt a tear while shoveling to conclude that is when the hernia occurred.

It is not surprising the claimant focused upon the stretching incident because that is when he first experienced pain in his abdomen. But again, upon further questioning from the insurance claims adjustor, claimant noted that he had experienced a tear sensation while shoveling. The uncontradicted medical testimony established that the hernia occurred when claimant experienced the tearing sensation while shoveling. Based upon the record compiled to date, this Board Member finds claimant has met his burden of proof to establish that he suffered a hernia which arose out of and in the course of his employment while shoveling.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>7</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 21, 2011, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2011.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge

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<sup>6</sup> K.S.A. 44-534a.

<sup>7</sup> K.S.A. 2010 Supp. 44-555c(k).